Supreme Court, U.S.
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No. 94-2038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM FLEMING,
Petitioners,

vs.

GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION
OF RESPONDENTS ROBERT LOWERY, DENNIS CORDIA AND THE CITY OF FLORISSANT, MISSOURI

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QUESTIONS PRESENTED

1. Whether the District Court properly granted summary judgment on Petitioner's 42 U.S.C. § 1983 claims in favor of Respondents Lowery and Cordia, based on their lack of personal involvement with any of Petitioner's alleged constitutional deprivations, four months after they filed their Motion for Summary Judgment with attached affidavits and granted summary judgment in favor of the City of Florissant, Missouri almost five months after it filed its Motion for Summary Judgment with attached affidavits where Petitioner had the time required by Fed.R.Civ.P. 56 and Local Rule 7(B)(2) of the United States District Court, Eastern District of Missouri to file "counteraffidavits."

2. Whether the District Court properly granted summary judgment in favor of Respondents Lowery, Cordia, and the City of Florissant on Petitioner's 42 U.S.C. § 1985(3) claim where these Respondents did not deprive Petitioner of his constitutional rights and Petitioner failed to offer a single piece of factual evidence to support a § 1985 conspiracy claim against them.

LIST OF PARTIES TO THE PROCEEDING

Petitioner:

William Fleming

Respondents:

Greater St. Louis Area Major Case Squad

City of Dellwood, Missouri

City of Jennings, Missouri

City of Florissant, Missouri

Dan Chapman

Robert Lowery

Harry Slaten

Michael Yarborough

Dennis Cordia

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No.

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On Petition for a Writ of Certiorari to the
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BRIEF IN OPPOSITION
OF RESPONDENTS ROBERT LOWERY, DENNIS CORDIA AND THE CITY OF FLORISSANT, MISSOURI

To the Honorable Supreme Court:

Respondents Robert Lowery, Dennis Cordia, and the City of Florissant, Missouri respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit is reproduced in the Appendix to the

Petition for Writ of Certiorari. (A.1–A.6). The Order and Memorandum of the United States District Court, Eastern District of Missouri, Eastern Division filed March 15, 1994 dismissing the cause of action and removing the case from the court's trial docket are reproduced in the Appendix to the Petition for Writ of Certiorari. (A.8 – A.13). The District Court's Order and Memorandum of August 19, 1993 granting Respondents Lowery and Cordia's Motion for Summary Judgment and dismissing them from the case are reproduced in the Appendix of this Brief in Opposition. (A.2 – A.11). Their Motion for Summary Judgment with affidavits is reproduced in this brief. (A.12 – A.19). The District Court's Order and Memorandum of February 11, 1994 granting Respondent City of Florissant, Missouri's Motion for Summary Judgment and dismissing the City of Florissant as a party are reproduced in Respondents' Appendix to the Brief in Opposition. (A.20 – A.25). The City's Motion for Summary Judgment with an affidavit is reproduced in this brief. (A.26 – A.30).

STATEMENT OF THE CASE

On January 27, 1987, Sergeant Kenneth Koeller of the City of Jennings, Missouri Police Department was shot and killed after he received a call to investigate a burglary in Jennings, Missouri. Respondent Michael Yarborough, a Jennings police officer, also responded to the burglary call and discovered Sergeant Koeller's body. Respondent Yarborough called for an ambulance and further assistance. Within minutes, six to ten additional officers arrived. They searched the area for suspects and witnesses. The next day the Jennings Police Department asked for the immediate activation of the Greater St. Louis Area Major Case Squad ("Major Case Squad") to investigate the killing, because it had discovered no witnesses, no suspects, and had very few leads. The Major Case Squad is an association composed of the police departments of municipalities located in the greater St. Louis metropolitan region.

Respondent Robert G. Lowery was Chief of Police for the City of Florissant, Missouri and Chairman of the three member Board of Directors of the Major Case Squad. After he consulted with the other board members by telephone, the board voted to activate the Major Case Squad and turned the investigation over to Respondent Dan Chapman, commander for the case and an officer with the City of Dellwood, Missouri Police Department. The board is never involved in the day–to– day management of an investigation. (A.15 – A.16).

Respondent Dennis Cordia, a detective with the City of Florissant Police Department, served as Chief Report Officer for the Major Case Squad. During the fifteen day investigation, he compiled and organized the documents generated by Major Case Squad officers. On February 5, 1987, following a Major Case Squad report to the St. Louis County Police Department, officers from the Major Case Squad applied for a warrant for Petitioner's arrest. Respondent Cordia, as custodian of records for the investigation, and at the request of Respondent Chapman, accompanied officers to the office of the Chief Warrant Officer for his review of the case. Cordia referenced records in the file as requested and performed other clerical duties. He also scheduled the polygraph examinations for certain witnesses and made transportation arrangements. Respondent Cordia did not participate in the administration or evaluation of these examinations. (A.17 – A.19).

After a warrant was issued, Petitioner was arrested on February 6, 1987. The Major Case Squad closed its investigation on February 9, 1987, and the City of Jennings Police Department resumed its supervision of the case. On February 29, 1987, Petitioner was indicted for the crime of murder in the first degree by the Grand Jury of St. Louis County, Missouri. On March 5, 1987, the St. Louis County Circuit Court heard and denied Petitioner's Application to Set Bail. Following the bail hearing,

Petitioner remained incarcerated until September 5, 1987, when charges against him were dropped, and he was released.

On January 31, 1992, Petitioner filed a Complaint against nine defendants, including Respondents Lowery, Cordia, and The City of Florissant, Missouri, in the United States District Court, Eastern District of Missouri, Eastern Division alleging many violations of his constitutional rights pursuant to several civil rights statutes. Specifically, Petitioner alleged that Respondents, while investigating the murder of Sergeant Koeller, deprived him of his rights by seeking a warrant for his arrest without probable cause, by presenting false testimony before the Grand Jury which led to his indictment for the murder of Sergeant Koeller, denial of bail, and wrongful incarceration. Count II alleged that Respondents conspired to deprive Petitioner "and all persons of black, Negro or Afro American heritage the equal protection of the laws" which resulted in Petitioner's arrest, indictment, denial of bail, and incarceration.

The District Court disposed of this case in pieces as to the various defendants. On June 30, 1992, it dismissed the Greater St. Louis Major Case Squad. On August 19, 1993, it granted summary judgment to Respondents Lowery and Cordia on grounds that they had no personal involvement in Petitioner's arrest, indictment by the grand jury, denial of bail, and incarceration for seven months. (A.2 – A.11). By separate order, the District Court granted summary judgment to Respondents Yarborough, Slaten, and the City of Jennings. On August 24, 1993, the District Court ordered Petitioner's pendent state law claims for false arrest, false imprisonment, and slander be dismissed as time barred and that Petitioner's § 1981 claim be dismissed for failure to state a claim. On February 11, 1994, the District Court granted summary judgment to the City of Florissant on both the § 1983 and § 1985(3) claims. (A.26 – A.30). On March 15, 1994, the District Court granted summary judgment in favor of Respondent Chapman and dismissed the case. The

Court of Appeals for the Eighth Circuit, in a per curiam opinion, affirmed the District Court's grant of summary judgment to all Respondents.

SUMMARY OF THE ARGUMENT

I. Petitioner presents no issue appropriate to the Court's exercise of its discretionary jurisdiction concerning the district court's grant of summary judgment to Respondents Lowery, Cordia, and the City of Florissant either on procedural or substantive grounds. The District Court issued its Order and Memorandum four months after Respondents Lowery and Cordia submitted their motion with affidavits and to Respondent City of Florissant almost five months after it filed its Motion for Summary Judgment. Petitioner had more time than required under Fed.R.Civ.P. 56 and Local Rule 7(B)(2) to file "counter affidavits." Furthermore, summary judgment with respect to these three Respondents was proper. As chairman of the board of the Major Case Squad, Respondent Lowery did not have the necessary direct and personal involvement to hold him personally liable for deprivation of rights pursuant to 42 U.S.C. § 1983. Respondent Cordia performed only ministerial functions when he was assigned to the Major Case Squad investigation as Report Officer. The City of Florissant did not have any role in the investigation. Nor did it have any custom, practice or procedure that could subject the municipality to § 1983 liability for Petitioner's alleged deprivation of constitutional rights.

II. The district court's grant of summary judgment on Petitioner's 42 U.S.C. § 1985 conspiracy claims presents no issue appropriate for this Court's exercise of its discretionary jurisdiction, because the District Court and the Court of Appeals applied the well settled law of this Court and the courts of appeal of the various circuits when they found that Petitioner presented no facts in support of his § 1985(3) claim against Respondents Lowery, Cordia, and the City of Florissant and failed to state § 1985(3) claims against these Respondents.

REASONS FOR DENYING THE WRIT

Petitioner fails to satisfy the criteria traditionally applied by this Court in determining whether to grant a writ of certiorari. The decisions by the courts below are entirely consistent with the decisions of other federal circuits and this Court, do not conflict with the decisions of the Missouri Supreme Court, do not raise an important issue of general relevance, nor do they depart from the accepted and usual course of judicial proceedings so as to call upon this Court to exercise its power of supervision. Petitioner in essence asks this Court, after consideration by the District Court and the Court of Appeals, to reconsider whether Petitioner presented to the trial court the modicum of evidence required to survive a motion for summary judgment.

I. Respondents Lowery, Cordia and the City of Florissant were entitled to summary judgment as a matter of law where Petitioner failed to show they had any direct, personal involvement in Petitioner's arrest, indictment and incarceration and the District Court issued its Order and Memorandum at least four months after their respective motions, well within the requirements of Fed.R.Civ.P. 56(c) and Local Rule 7(B)2.

Federal Rule of Civil Procedure 56(c) provides that a defending party may at any time move for summary judgment in the party's favor by serving a motion at least ten days before the time fixed for a hearing. U.S. District Court of Missouri, Eastern District Rule 7(B)(2) requires a party opposing a motion for summary judgment to file any written brief or memorandum of law or appropriate extra pleading material within twenty days after being served with the motion. Petitioner never previously raised his contention that the District Court erred by refusing to allow or consider counter affidavits before granting summary judgment as to Respondents Lowery, Cordia, or the City of Florissant, nor could he.

On April 19, 1993, Respondents Lowery and Cordia moved for summary judgment with affidavits. (A.12 – A.19). Four months later, the district court entered an Order and Memorandum granting summary judgment in favor of Respondents Lowery and Cordia on the merits of Petitioner's complaint and dismissed them from the case. (A.2 – A.11). Petitioner filed a Memorandum in Opposition on May 11, 1993. Previously, in July, 1992, Petitioner had filed interrogatories and a request for admissions but conducted no further discovery for the following year with respect to these Respondents.

On September 24, 1993, the City of Florissant, Missouri filed a Motion for Summary Judgment with an attached affidavit by the City's Mayor. (A.26 – A.30). Over four months later, on February 11, 1994, the district court granted summary judgment in favor of the City of Florissant. (A.20 – A.25). Petitioner filed suggestions in opposition on October 6, 1993.

Not only did the district court correctly apply Fed.R.Civ.P. 56(c) procedurally, it correctly entered judgment as a matter of law where all of the evidence before the court demonstrated that there was no genuine issue as to material fact. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Summary judgment is an appropriate disposition of a case where it is clear plaintiff has not or cannot present any set of facts entitling him to the relief sought. Petitioner bore the burden of setting forth specific facts showing that evidence existed to allow reasonably minded jurors to draw inferences that would result in a verdict in his favor. A mere "scintilla" of evidence, "merely colorable" evidence, or evidence "not significantly probative" is insufficient to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–252 (1986). Petitioner failed to produce the modicum of evidence required to survive the motions for summary judgment of these Respondents.

Before any 42 U.S.C. § 1983 liability can attach to a state actor for a deprivation of rights secured by the federal constitution and laws, the plaintiff must show his harm was caused by a constitutional violation, and the state actor must have some direct responsibility for the alleged wrongdoing.[1] *Baker v. McCollum*, 443 U.S. 137, 140 (1979). By definition, a state actor who has no personal role in the deprivation of constitutional rights "lacks the bad faith required to expose him to damages liability under § 1983." *Harris v. City of Pagedale*, 821 F.2d 499 (8th Cir.) *cert. denied*, 484 U.S. 986. The federal courts uniformly hold that a § 1983 action will not lie against a supervisory police officer for failure to prevent police misconduct, absent a showing of direct responsibility for or involvement in the improper conduct. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982); *Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980); *Kosta v. Hogg*, 560 F.2d 37, 40 (1st Cir. 1977). A plaintiff must show that the supervisor breached a duty to Plaintiff which was the proximate cause of the injury or an affirmative link between the unconstitutional acts of a subordinate officer and the supervisor shown by participation or acquiescence. *McClelland v. Facteau*, 610 F.2d 693, 695–696 (10th Cir. 1979).

The uncontradicted evidence demonstrated that the involvement of Respondents Lowery and Cordia was limited and/or ministerial in nature. Respondents Lowery and Cordia did not seek a warrant for Petitioner's arrest, did not testify before the Grand Jury, did not seek his indictment, nor did they appear or testify before the judge who set Petitioner's bond.

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[1] It is well established that later proof of innocence does not entitle a person mistakenly charged with a crime, arrested, incarcerated, or tried to assert a claim for unconstitutional deprivation of rights against the police officials who conduct the investigation or mistakenly arrest a suspect. *Baker*, 443 U.S. at 145.

Respondent Lowery's police supervisory role as chairman of the board of the Major Case Squad cannot subject him to § 1983 liability based upon the theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Respondent Lowery's involvement extended only as far as making the phone calls necessary and voting to activate the Major Case Squad investigation. He had no personal involvement in the subsequent investigation, and his preinvestigation involvement had no causal connection to plaintiff's alleged deprivations. (A.15 – A.16). Petitioner presented no evidence that Respondent Lowery exhibited deliberate indifference to or tacit authorization of a pattern of unconstitutional conduct by the Major Case Squad or failed to train, monitor, supervise, or control the Major Case Squad officers involved in the investigation. Petitioner failed to demonstrate either a pattern of previous misconduct by officers of the Major Case Squad or the failure of Respondent Lowery to take remedial steps following notice of a pattern of unconstitutional conduct by subordinates. Cf. *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986).

Respondent Cordia, as Report Officer of the Major Case Squad, organized the records and reports of the investigation. At no time did he act in an investigative capacity. He had no personal knowledge of the facts contained in the case report or personal involvement in the investigation, interrogation, or arrest of any suspect or witness. He accompanied a Major Case Squad officer to the office of the chief warrant officer in his capacity as custodian of records and referenced documents as requested. Respondent Cordia did not serve as a proponent of the records. He had no reason to suspect that information in the Major Case Squad Report was false. He scheduled some witness polygraph tests, but he neither administered the tests nor was he present during the examination. (A.17 – A.19). The lower courts correctly found that Respondent Cordia's limited and strictly ministerial functions in the investigation did not provide the

requisite direct involvement or exercise of discretion to attach any kind of liability to him for the alleged deprivation of constitutional rights.

No § 1983 liability attaches for a negligent officer in the performance of ministerial duties. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). The law differentiates between potential § 1983 liability for discretionary duties and no liability for ministerial duties for good reason. If a plaintiff could hold a clerk of records liable for alleged § 1983 deprivations, Petitioner could subject a potentially infinite number of file clerks, dispatchers, typists and secretaries exposed to a case to §1983 suits. Respondent Cordia, acting only in a ministerial capacity in his role as Report Officer, falls within that line of cases dismissing officers whose involvement is ministerial and not directly causally related to plaintiff's harm.

The lower courts never needed to address the issue of qualified immunity for these Respondents since they had not engaged in conduct which could potentially subject them to § 1983 liability. Cf. *Malley v. Briggs*, 475 U.S. 335 (1986).[2]

At the time the City of Florissant moved for summary judgment, Respondents Lowery and Cordia, the only two Florissant officers involved with the Major Case Squad who could have potentially carried out the allegedly unconstitutional practices, policies or customs of the City of Florissant, lacked direct personal involvement and causal relation to the deprivations claimed and had been dismissed from the case. (A.24). If

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[2] Petitioner mis–states *Malley*, 475 U.S. at 345, n. 7. What *Malley* said was that a judge's decision to issue a warrant does not break the causal chain between the "application for a warrant and the improvident arrest". (Petition for Writ of Certiorari, p. 7). The Court of Appeals spoke of the effect of an indictment on the chain of causation between the alleged false arrest and a violation of constitutional rights.

Respondents Lowery and Cordia cannot be held liable under § 1983 for Petitioner's injuries, the City of Florissant cannot be held liable. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482–483 (1986).

A municipality will not incur § 1983 liability on a theory of respondeat superior. Municipal liability only attaches where the municipality itself causes the constitutional violation by a city custom, policy, procedure, regulation, or failure to train municipal employees which amount to deliberate indifference to the right of persons. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). The City of Florissant had no explicit or implicit policy, ordinance, regulation, practice, or custom to arrest without probable cause, procure false testimony, or act unconstitutionally in the manner asserted by Petitioner. (A.29 – A.30). Petitioner failed to provide any evidence that the City of Florissant condoned any unconstitutional custom, practice, policy or lack of training. It necessarily follows that the District Court properly granted summary judgment to the City of Florissant.

II. Petitioner cannot state a § 1985(3) conspiracy claim against Respondents Lowery, Cordia, and the City of Florissant where Respondents Lowery and Cordia, the only municipal actors for the City of Florissant have not violated Petitioner's constitutional rights by any acts or failure to act, because the City of Florissant cannot carry out acts in furtherance of a conspiracy to deprive Petitioner of his constitutional rights absent a violation of his rights by its agents.

Petitioner attempts to paint a picture of a § 1985(3) conspiracy claim in Count II which stood alone and unrebutted by the Respondents. However, examination of the Complaint shows that the factual basis for the conspiracy claim in Count II was the same as Count I. Plaintiff's attempt to draw a distinction between the claims is a distinction without a difference. Al-

though Counts I and II have different legal bases, the allegations in support are identical. By putting the underlying factual allegations in issue through affidavit and motions for summary judgment, Respondents Lowery, Cordia, and the City of Florissant demonstrated that there was no factual support for any of Plaintiff's conclusory allegations against these Respondents in either Counts I and II. The District Court concluded that the Petitioner had made only "vague and conclusory allegations about a conspiracy" and had "not offered a single piece of factual evidence to support any of his conspiracy allegations." The City of Florissant could not act in a conspiracy to deprive Petitioner of his rights if its "municipal actors have been judicially determined not to have violated" Petitioner's constitutional rights. (A.24).

Petitioner failed to plead or support his § 1985(3) conspiracy claim with the requisite particularity, specifically demonstrating with material facts that Respondents Lowery, Cordia, and the City of Florissant, singly or together, reached an agreement with others to deprive the Petitioner of the equal protection or equal privileges and immunities under the law, that Respondents committed an act in furtherance of the conspiracy, or that Petitioner suffered an injury or was deprived of rights and privileges secured by the federal constitution and the laws. Nor did he show a pattern of conduct of these Respondents by which he could prove some racial or class based "invidiously discriminatory animus" behind the alleged conspirator's action. *Griffin v. Breckenridge*, 403 U.S. 88, 102–103 (1971); *City of Omaha Employees Betterment Assn. v. Omaha*, 883 F.2d 650, 652 (8th Cir. 1989).

Respondents Lowery and Cordia had already shown that they had committed no acts in respect to the issuance of a warrant, arrest, indictment, bail hearing, or incarceration of Petitioner and did not violate Petitioner's constitutional rights. Petitioner's belief that Respondents participated in a racially motivated

conspiracy to harass African-Americans is not evidence. Therefore, Petitioner could not state a § 1985(3) conspiracy claim against Respondents Lowery, Cordia, and the City of Florissant. Petitioner merely recast his unsubstantiated allegations in his Complaint into overheated rhetoric on appeal and in his Petition to this Court.

Summary Judgment on Petitioner's § 1985(3) claims was required where the record submitted by Petitioner could not lead a rational trier of fact to find for the nonmoving party and Petitioner did not produce facts to show there was a genuine issue for trial. Petitioner failed to offer any evidence of acts by Respondents Lowery, Cordia, and the City of Florissant which deprived Petitioner of his constitutional rights in furtherance of a conspiracy or a pattern of race based invidious discrimination.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

ORDER

[Filed: August 19, 1993]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that the defendants Lowery and Cordia's motion for summary judgment (#61), filed September 24, 1993 be and is **GRANTED**.

IT IS FURTHER ORDERED that judgment is entered for defendants Lowery and Cordia and against the plaintiff on the merits of the plaintiff's complaint. This cause of action is hereby **DISMISSED** as to defendants Lowery and Cordia.

IT IS FINALLY ORDERED that plaintiff's Motion for Rule 11 sanctions is **DENIED** as moot.

Dated this *19th* day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

MEMORANDUM

[Filed: August 19, 1993]

This matter comes before the Court on defendants Lowery and Cordia's motion for summary judgment and plaintiff's motion for sanctions. Plaintiff brings this action against several named defendants, including defendants named herein, for alleged violations of plaintiff's constitutional rights pursuant to 42 U.S.C. Sections 1981, 1983, 1985, 1988 and 4th, 5th, 8th and 14th Amendments. Specifically, plaintiff alleges that the defendants, while investigating the murder of a Jennings police officer in January of 1987, presented false and untrue testimony before the grand jury and further falsely and unlawfully indicted and arrested plaintiff for the murder of the officer and further caused plaintiff to be falsely incarcerated without reasonable bail.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of

material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broad–casting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must submit "sufficient probative evidence [that] would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy." *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985). A mere scintilla of evidence is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 252. If the evidence the nonmoving party puts forward "is merely colorable," or "is not significantly probative," the movant is entitled to summary judgment as a matter of law. *Id.* at 249–50. With these principles in mind, the Court turns to an examination of the facts.

On January 27, 1987, Sergeant Kenneth Koeller of the Jennings Police Department was shot and killed while responding to a burglary call at the Northland Shopping Center in Jennings, Missouri. Defendant Yarbrough, a Jennings police officer, also responding to the burglary call, discovered Sergeant Koeller's body. Defendant Yarbrough and fellow Jennings Police Officer

Bensing secured the scene and called for an ambulance and further assistance from the Jennings Police Department. Within minutes of his call, six (6) to ten (109) additional officers arrived. Yarbrough directed them to search the area for suspects and witnesses. Forty minutes later, Detective Steve Burnett of the St. Louis County Police Department Identification Unit arrived at the crime scene and took command of the officers at the crime scene. After Burnett took control of the crime scene, defendant Yarbrough participated in a foot search of the immediate area and later filed his report with his superiors at the Jennings Police Department.

On January 28, 1987, the St. Louis Area Major Case Squad (hereinafter "MCS") was asked by the Jennings Police Department to begin an investigation of the murder. There is some dispute about who in the Jennings Police Department requested the assistance of MCS. Defendant Slaten's affidavit states he was out of town and Colonel Orr, acting Chief of Police for Jennings, called MCS, but MCS Chairman of the Board, defendant Robert Lowery, states that defendant Slaten requested the activation of MCS. Despite the dispute over who requested the activation of MCS, it is clear that the request was made by the Jennings Police Department and defendant Lowery consulted with three members of the MCS Board of Directors and ordered the activation of MCS, which began its investigation of Koeller's death on January 28, 1987. Once the MCS was activated to investigate the murder of Sergeant Koeller, the Jennings Police Department ceased its active investigation of the shooting.

Colonel Dan Chapman of the Dellwood Police Department, MCS Commander, was assigned as Commander of the case, designated as MCS Number 141. In addition, defendant Officer Dennis Cordia of the Florissant Police Department was assigned to MCS as Report Officer for MCS Number 141.

During the fifteen (15) day investigation, officers from MCS interviewed possible witnesses and suspects at or near the scene of the crime and conducted polygraph examinations on two individuals at the St. Charles Police Department. The polygraph examinations were scheduled by defendant Cordia, but defendant Cordia did not participate in the execution or evaluation of these examinations. On February 5, 1987, following an MCS report to the St. Louis County Police Department, Lieutenant Jack Oliver of MCS applied for a warrant for plaintiff's arrest. At the request of defendant Chapman, defendant Cordia accompanied Lieutenant Jack Oliver to Chief Warrant Officer Tom DePriest's office. As acting custodian of records for the investigation of Sergeant Koeller's murder, defendant Cordia brought with him certain files for Chief Warrant Officer DePriest to review. A warrant for plaintiff's arrest was issued and plaintiff was arrested for the crime of Murder in the first degree on February 6, 1987. MCS closed investigation Number 141 on February 9, 1987.

Although MCS closed its investigation of Sergeant Koeller's murder upon the arrest of plaintiff, the Jennings Police Department resumed its supervision of the case and preceded to review the MCS's findings. The officer in charge of the Jennings Police Department's supervision of the case was Officer Hager of the Jennings Police Department. Hager was assisted by Officer Pratt, also of the Jennings Police Department. Defendant Jennings Police Chief Slaten reviewed MCS files and Jennings Police Department reports about the case. He did not authorize or direct any acts which plaintiff complains of and had no knowledge of any such acts.

On February 29, 1987, plaintiff was indicted for the crime of murder in the first degree by the Grand Jury of St. Louis County. Defendants Cordia and Lowery did not appear before the Grand Jury to testify with respect to plaintiff. On March 5, 1987,

plaintiff's application to set bail was heard before Honorable Robert McAllister, St. Louis County Circuit Judge. Defendants Cordia and Lowery did not appear before Judge McAllister to testify with respect to the setting of plaintiff's bond. Following the bail hearing, plaintiff remained incarcerated until September 5, 1987, when charges against him were dropped and he was released.

Defendant Lowery

A Section 1983 action against police supervisor officers cannot be based upon the theory of *respondeat superior. Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2087, 56 L.Ed.2d 611 (1978). Moreover, "[A] section 1983 action will not lie against police supervisory officers for failure to prevent police misconduct, absent a showing of direct responsibility for the improper action". *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982) (citing *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598; *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977)). See also, *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986) (*quoting Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980)). "What is required is a causal connection between the misconduct complained of and the official sued". *Pirch*, 677 F.2d at 685. To meet this burden the plaintiff must establish an "affirmative link" between defendant's action and the alleged deprivation of Constitutional rights. See *Rizzo*, 423 U.S. at 377.

The evidence submitted by plaintiff fails to establish "personal involvement" that constitutes an "affirmative link" between defendant Lowery as Chairman of The Board for the Major Case Squad and plaintiff's alleged deprivation of Constitutional rights. Plaintiff concedes that the direct personal involvement of defendant Lowery only extended as far as the activation of MCS and that he took no part in the day to day management of the MCS investigation.

As a result, plaintiff argues that defendant Lowery's failure to train, monitor, supervise or control the officers involved in the investigation caused his alleged mistreatment. In support of this charge, plaintiff alleges that defendant Lowery was deliberately indifferent to Fleming's unconstitutional treat–ment, knew or should have known of the misconduct and failed to stop the alleged mistreatment.

"A cause of action based on such a theory may be maintained only if [plaintiff] can demonstrate deliberate indifference or tacit authorization of the offensive acts by failing to take remedial steps following notice of a pattern of such acts by his subordinates". *Wilson*, 801 F.2d at 322. Affidavits submitted by defendant Lowery establish that he did not participate, supervise, organize or execute the investigation of plaintiff. Furthermore, defendant Lowery states that he was never consulted about or knew of the arrest of plaintiff until after his arrest and did not cause or direct the indictment, imprisonment or holding without bond of plaintiff.

The evidence submitted by plaintiff does not raise a material issue of fact as to defendant Lowery's stated level of participation in MCS's investigation, whether defendant Lowery was deliberately indifferent or whether defendant Lowery gave tacit approval of the alleged mistreatment. None of the evidence submitted by plaintiff indicates that defendant Lowery had knowledge of, approved of, acquiesced in or participated in the alleged misconduct of the investigating officers. Furthermore, the record does not show a pattern of previous misconduct by officers of MCS that would indicate that defendant Lowery knew or should have known about any lack of training, monitoring, supervising or control that would lead to unconstitutional acts by subordinates.

Therefore, having found no genuine issue of material fact, this Court finds that defendant Lowery is entitled to judgment as a matter of law.

Defendant Cordia

In Section 1983 actions, "Only persons who [are] directly involved in the wrongdoing may be held liable." *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977). See also, *Rizzo*, 423 U.S. at 377. "Liability may only be found if there is personal involvement of the officer being sued." *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986) (quoting *Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980)). "What is required is a causal connection between the misconduct complained of and the official sued." *Pirch*, 677 F.2d at 685. To meet this burden, plaintiff must establish an "affirmative link" between the defendant's action and the alleged deprivation of Constitutional rights. See *Rizzo*, 423 U.S. at 377.

Plaintiff alleges that defendant Cordia's personal involvement in the investigation was significant enough to create an affirmative link between the alleged mistreatment of plaintiff and defendant Cordia's actions. Plaintiff avers that defendant Cordia's presence during the warrant application meeting placed a duty upon defendant Cordia, as Record Officer, to prevent the request for the warrant if Cordia believed the request was not based on probable cause. Defendant Cordia admits that, at the request of his commander, he did accompany the officer who requested plaintiff's arrest warrant and pulled files for the Warrant Officer to review. However, defendant Cordia's affidavit states that he did not present information which he knew to be false and he had no reason to suspect that information he referenced in the Squad report was false. Plaintiff has not supplied any factual evidence that suggests that defendant Cordia knew or should have known the information in the file was false or that defendant Cordia, contrary to his statement, acted in bad faith.

Plaintiff also alleges that defendant Cordia's role in scheduling polygraph tests for the MCS investigation of plaintiff estab-

lishes a sufficient causal link between defendant Cordia and the alleged mistreatment. Plaintiff's assertion is based on two letters signed by defendant Cordia that indicate he scheduled, on behalf of MCS, polygraph tests to be performed on two possible suspects. Defendant Cordia admits that he, at the request of MCS Commander Dan Chapman, did schedule the administration of these polygraph tests. However, defendant Cordia claims that he did not administer the polygraph tests, was not present at any of the examinations and did not work in any investigatory capacity during the MCS investigation.

Again, the evidence supplied by plaintiff fails to establish a material issue of fact as to the existence of an affirmative link between the constitutional deprivation alleged and defendant Cordia's personal involvement. Plaintiff has failed to show that defendant Cordia did anything more than schedule the polygraph tests of potential suspects, which is not sufficient evidence to establish an affirmative link between the alleged mistreatment of plaintiff and defendant Cordia.

Therefore, finding that there is no genuine issue as to material fact, this Court finds that defendant Cordia is entitled to summary judgment as a matter of law.

The Court further finds plaintiff's motion for sanctions to be meritless. This case was recently transferred to the under–signed from Judge Clyde S. Cahill. While pending before Judge Cahill, defendants filed a motion for summary judgment similar to the present one. Judge Cahill denied the motion because factual issues remained in dispute due to lack of adequate time to conduct discovery. Over one year has passed since Judge Cahill denied the defendants' first motion for summary judgment. The defendants have conducted additional discovery, while the plaintiff has done nothing to advance his claims. Judge Cahill's ruling on the defendants' prior summary judgment motion does not

preclude the filing of the present motion nor restrict this Court's review of the motion.

Dated this *19th* day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

MOTION OF DEFENDANTS ROBERT LOWERY AND DENNIS CORDIA FOR SUMMARY JUDGMENT

[Filed: April 19, 1993]

Comes now defendants Robert Lowery and Dennis Cordia, and pursuant to Rule 56, F.R.C.P., move this court to enter summary judgment in favor of defendants Robert Lowery and Dennis Cordia for the reason that the pleadings and affidavits on file show that there is no genuine issue as to any material fact and that these defendants are entitled to judgment as a matter of law. For the grounds of this motion, the defendants Robert Lowery and Dennis Cordia state:

1. Plaintiff William Fleming has brought this action against Robert Lowery and Dennis Cordia claiming said officers have violated his federally protected rights under 42 U.S.C. § 1983, 1981, 1988; and the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. In Count I, Paragraphs 10–23, plaintiff claims the above listed rights were violated as a result of the defendants' actions in procuring false testimony for issuance of a warrant, causing him to be wrongfully indicted, arrested, held without bond, and imprisoned. Count Ii alleges a conspiracy on the part of defendants to do the same.

2. It is a well established principle of law that for 42 U.S.C. § 1983 liability to attach, the defendant must have been personally involved in the act or acts causing harm to the plaintiff.

3. It is a well established principle of law that for 42 U.S.C. § 1983 liability to attach, the defendants' act must be so causally related such that there exists an affirmative link between the defendants' act and the plaintiff's harm.

4. Defendants, Robert Lowery and Dennis Cordia, had no personal involvement in those acts which plaintiff claims caused him damage. At no time did defendants Cordia or Lowery procure false testimony, know of or cause issuance of a warrant based on false testimony, indict, arrest, cause plaintiff to be held without bond or cause plaintiff to be imprisoned. (See attached Affidavits of Lowery and Cordia incorporated herein by reference as defense Exhibits A and B in support of Motion for Summary Judgment.)

5. Furthermore, the limited involvement of each defendant cannot, as a matter of law, be said to have a causal connection such that there is an affirmative link between those acts and the harm suffered by plaintiff.

6. Where defendants' actions do not amount to personal involvement, nor is there a causal connection between these acts and the harm suffered, defendants, Lowery and Cordia, are entitled to judgment as a matter of law.

EVANS & DIXON
/s/Henry D. Menghini
Henry D. Menghini #17076
Kurt E. Wolfgram #43013
Attorneys for Defendants City of
Florissant, Lowery and Cordia

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 19th day of April, 1993, to: Helton Reed, Jr., Attorney for Plaintiff, and Stephen H. Gilmore, Attorney for Plaintiff . . . .

/s/ Henry D. Menghini

DEFENDANT'S EXHIBIT A

STATE OF MISSOURI)

) SS

COUNTY OF ST. LOUIS)

AFFIDAVIT

Robert Lowery, being duly sworn, upon his oath, states:

1. I am Chief of Police for the City of Florissant and serve as Chairman of the Board of Directors of the Major Case Squad of Greater St. Louis.

2. On January 28, 1987, I received a call from Chief Harry Slaten of the Jennings Police Department. He informed me that his sergeant, Kenneth Koeller, was shot and killed while investigating a burglary at No. 22 Northland Shopping Center in Jennings, Missouri. Chief Slaten indicated that they had no witnesses, no suspects and very few leads, and was therefore requesting activa– tion of the Major Case Squad of Greater St. Louis.

3. After being apprised of this situation, I consulted with three other board members and with their approval, activated the Major Case Squad.

4. The name William Fleming and his identity was never mentioned or considered in my decision to activate the Major Case Squad.

5. Upon activation, the entire investigation was turned over to the MCS Commander, Dan Chapman. Thereafter, I took no part in the supervision, organization, or execution of the investigation.

6. My sole duty as Chairman of the Board of Directors of the Major Case Squad, was to consult with other board members

in deciding whether activation of the Squad was proper under these circumstances.

7. At no time did I interview, interrogate or otherwise speak with any witnesses or suspects in this case.

8. At no time did I direct or cause the request or issuance of a warrant for William Fleming.

9. At no time did I arrest or cause the arrest of William Fleming.

10. At no time did I cause or direct the indictment or imprisonment of William Fleming, nor did I cause or direct that he be held without bond.

11. I was never consulted, nor did I know of the arrest of William Fleming in connection with this investigation until after Mr. Fleming had been arrested.

/s/Robert Lowery

Subscribed and sworn to before me this 16th day of April, 1993.

/s/Notary Public

My commission expires: May 11, 1995

DEFENDANT'S EXHIBIT B

STATE OF MISSOURI)

) SS

COUNTY OF ST. LOUIS)

AFFIDAVIT

Dennis Cordia, being duly sworn, upon his oath, states:

1. On January 28, 1987, I was called to serve as Report Officer in Major Case Squad Investigation No. 141 activated to investigate the homicide of Sergeant Kenneth Koelier of the Jennings Police Department.

2. I am a full time employee of the City of Florissant Police Department and was on loan to the Major Case Squad for the period of its activation that time being from January 28, 1987 through February 9, 1987.

3. As Report Officer, it is my primary responsibility to maintain the Squad case file at the command post. All other duties center around this primary directive. As Report Officer, my other duties include:

a. Require each investigator to use and properly complete the forms provided for reporting.

b. Require reports in triplicate or as required. Additional copies may be made if necessary to assist the investigation staff in its duties. One copy each shall be designated to the Squad, requesting agency and the prosecutor.

c. Require investigators to submit individual reports for each lead assigned.

d. Upon termination of the Squad's participation in the investigation, prepare a general report of the findings, which is

indexed and divided according to chronology of events and categories of investigation as approved by the Board of Directors.

e. Upon successful solution of a case by the Squad, prepare an indexed prosecutive summary listing the facts of the crime, the criminal history of the defendant and the evidence to be presented and by whom.

f. Should exercise discretion in preventing disclosures possibly hampering future investigation or endangering witnesses.

g. Maintain file of case news clippings for use as required and file with the report.

h. Serve as liaison officer between the Squad Commander and the Officer in Charge relative to press releases and suggest means of using press facilities to assist the investigators.

i. Prepare information for press releases, which shall be released to the various news media only by the Squad Commander and the Officer in Charge, or their designates, who shall only release information agreed upon between the Squad Commander and the Officer in Charge.

j. Maintain the Squad case file at the Command Post.

4. On February 5, 1987, I was requested by Commander Dan Chapman to accompany him and Lieutenant Jack Oliver to the St. Louis County Prosecutor's Office to request a warrant for the arrest of William Fleming. To the meeting, I brought the Squad report.

5. At the February 5, 1987 meeting, I, at the request of my Commander, Dan Chapman, pulled documents from the MCS file for the review of Chief Warrant Officer, Tom DePriest.

6. At no time did I present information which I knew to be false. Nor did I have information causing me to suspect that information I referenced in the Squad report was false.

7. I did not appear before the Honorable Robert McAllister on March 5, 1987 to offer or endorse any testi–mony with respect to William Fleming's bail hearing.

8. I did not appear on or about February 29, 1987 to offer or endorse any testimony before the Grand Jury of St. Louis County in the matter of William Fleming.

9. At the request of Major Case Squad Commander Dan Chapman, I set up an appointment for the polygraph examination of those individuals referenced in what has been attached as Affidavit Exhibit 1.

10. I arranged for the examination of these individuals by calling Detective Miller of the St. Charles Police Department. I made this call in my role as report officer for Major Case Squad investigation 87–141.

11. I did not administer nor was I present during the examination of these individuals.

12. At no time did I have first hand knowledge of any of the facts or circumstances relating to any witness or suspect in this investigation. At no time did I work in an investigative capacity on Major Case Squad Investigation No. 141. At no time did I talk with any suspect or witness, or gather any evidence in this case. It was my sole duty as Report Officer to keep the Squad file in an organized and presentable fashion.

/s/Dennis Cordia 241

Subscribed and sworn to before me this 6th day of April, 1993.

/s/Notary Public

My commission expires: May 11, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

ORDER

[Filed: February 11, 1994]

In accordance with the memorandum filed herein this day,

IT IS HEREBY ORDERED that the defendant City of Florissant's motion for summary judgment (#61), filed September 24, 1993 be and is **GRANTED**. Judgment is entered for the defendant and against the plaintiff on the merits of the plaintiff's complaint, including both the §1983 and the §1985(3) claims. Defendant City of Florissant is hereby **DISMISSED** from this cause of action.

Dated this *11th* day of February, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

MEMORANDUM

[Filed: February 11, 1994]

Plaintiff has filed this action alleging violations of his constitutional rights in connection with his arrest and pre–trial incarceration for the murder of a Jennings police officer. This matter is before the Court on the defendant City of Florissant's motion for summary judgment (#61), filed September 24, 1993. Responsive pleadings have been filed.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to

material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976).

Defendant City of Florissant (hereinafter referred to as simply "Florissant") contends that the plaintiff's claim of liability against it is one based upon a theory of *respondeat superior*, which is not cognizable under §1983. Florissant further contends that even plaintiff's vague allegation of an unconstitutional governmental practice, policy or custom is not actionable because the only two Florissant municipal officers involved in this cause of action have been dismissed. Plaintiff contends that summary judgment should be denied because Florissant was a direct participant in allegedly violating plaintiff's constitutional rights by voluntarily associating with the Major Case Squad and failing to train and supervise its officers. Plaintiff buttresses his

position by stating "[t]here is no question that Plaintiff Fleming was improperly arrested and imprisoned and there is no question that the Chief of Police of the City of Florissant set into motion the investigation which brought about that result." Plaintiff's Suggestions in Opposition to Florissant's Motion for Summary Judgment, pg. 2.

The plaintiff's position is totally meritless. Firstly, the only two Florissant municipal offers allegedly involved in violating the plaintiff's constitutional rights, Police Chief Robert Lowery and Officer Dennis Cordia, were summarily dismissed from this case on August 19, 1993. The plaintiff bases his claim against Florissant on the theories that its law enforcement officer violated the plaintiff's constitutional rights because of inadequate training and from fol– low—ing municipal custom or policy. Since the Court has deter–min–ed that the Florissant law enforcement officers did not violate the plaintiff's constitutional rights, plaintiff cannot pursue a §1983 claim against Florissant on either one of his theories. *See, City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Garner Gregory, Administrator of the Estate of Joe Edwin Gregory, et al. v. City of Rogers, Ark.*, 974 F.2d 1006, 1012 (8th Cir. 1992); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Secondly, the doctrine of *respondeat superior* is inapplic–able in §1983 actions. *Givens v. Jones*, 900 F.2d 1229, 1233 (8th Cir. 1990); *Wilson v. City of Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986); *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985). Municipalities cannot be held liable under a *respondeat superior* theory. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Although Florissant's summary judgment motion does not particularly address the §1985(3) claim still pending, plaintiff does refer to it in his response; thus, the Court believes it is relevant to address it now. It is this Court's considered opinion that since Florissant's agents are no longer defendants in this case, plaintiff cannot maintain a conspiracy claim against it.

42 U.S.C. §1985(3) prohibits conspiring to deprive individuals of their civil rights because of race. The elements of a cause of action for civil conspiracy under §1985 are 1) conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws; 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Carpenters v. Scott*, 463 U.S. 825, 828–29 (1983) *citing*, *Griffin v. Breckinridge*, 403 U.S. 88 (1971). The complaint must allege specific facts "suggesting that there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end." *Duvall v. Sharp*, 905 F.2d 1188, 1189 (8th Cir. 1990). Conspiracy allegations must contain "sufficient specifity and factual support to suggest a 'meeting of the minds'". *O'Dell v. McSpadden*, 780 F.Supp. 639, 644–45 (E.D.Mo. 1991) quoting *Deck v. Leftridge*, 771 F.2d 1168, 1170 (8th Cir. 1985) (citations omitted).

In the present case, plaintiff has made only vague and conclusionary allegations about a conspiracy. He has not offered a single piece of factual evidence to support any of his conspiracy allegations. Furthermore, as a municipality, Florissant can only act through its agents. Florissant cannot carry out any acts in furtherance of a conspiracy to deprive the plaintiff of his constitutional rights if its only municipal actors have been judicially determined not to have violated the plaintiff's constitutional rights. Florissant cannot carry out any overt acts reasonably related to the promotion of the alleged conspiracy without human actors. Since its law enforcement officers have been dismissed out of this case, it is axiomatic that Florissant cannot be held liable for taking action in furtherance of a conspiracy to deprive the plaintiff of his civil rights on account of his race. Plaintiff's §1985(3) claim against defendant City of Florissant must fail.

Summary judgment will be granted for defendant City of Florissant on plaintiff's §1983 claim; as well as on the plaintiff's §1985(3) claim.

Dated this *11th* day of February, 1994.

/s/ Stephen N. Limbaugh
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:92CV185SNL

WILLIAM FLEMING,
Plaintiff,
vs.
GREATER ST. LOUIS AREA MAJOR CASE SQUAD, ET AL.,
Defendants.

CITY OF FLORISSANT'S

MOTION FOR SUMMARY JUDGMENT

[Filed: September 13, 1993]

COMES NOW Defendant, City of Florissant, and pursuant to Rule 56, F.R.C.P., moves this Court to enter summary judgment in favor of Defendant City of Florissant for the reason that there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law. For the grounds of this motion, Defendant City of Florissant states as follows:

1. Plaintiff William Fleming has brought this action against City of Florissant claiming said defendant violated his federally protected rights under 42 U.S.C. § 1983, 1981, 1988; and the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. Plaintiff's claims against City of Florissant are based on the theory of *respondeat superior*. See, Plaintiff's Complaint specifically, Paragraphs 7 and 24.

2. By order dated August 19, 1993, Defendants Lowery and Cordia's Motion for Summary Judgment was granted and said defendants dismissed from the case. See Order of Court attached as Exhibit A.

3. Where the only persons who acted on behalf of the City of Florissant have been dismissed from the lawsuit, so should the City of Florissant be dismissed.

4. Not only is there no *respondeat superior* liability, but Plaintiff states no cause of action under any other recognized theory of recovery against a municipality.[1] It is well settled that a municipality can only be held liable for § 1983 violations where the action alleged to be unconstitutional includes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by the municipality's officers. See, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690–91 (1978). Where only municipal officers of the City of Florissant have been dismissed from the suit, there is no conduct upon which to base a suit under § 1983. Further, see Affidavit of Mayor James J. Eagan that no policy, official or otherwise, exists which condones or permits the treatment alleged by Plaintiff. (Exhibit B.)

5. A plaintiff might maintain an action where the alleged unconstitutional action occurred pursuant to govern–mental custom. *Id.* 436 U.S. at 690–691. However, Plaintiff Fleming's claim, if any, of an unconstitutional governmental custom is irrelevant where Lowery and Cordia (the only potential persons to effect the alleged custom) have been dismissed from the suit and found to be neither sufficiently personally involved nor causally related to the actions which form the basis of Plaintiff's Complaint.

6. A municipality might be sued under § 1983 if it failed to adequately train or supervise its law enforcement officials. See, *Canton v. Harris*, 489 U.S. 378 (1989). However, where defen–

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[1] Although Plaintiff's claim against the City of Florissant appears to be based solely on the theory of *respondeat superior*, there are vague references in the Complaint to unconstitutional customs or policies.

dants Lowery and Cordia's actions did not constitute personal involvement having an affirmative link with Plaintiff Fleming's alleged deprivation of constitutional rights; and where the affidavits of Lowery and Cordia, previously submitted, show they took no part in the day–to–day management of the investigation, there is no action or person upon which to base liability against the City of Florissant and therefore, any claims based on training or super– vision must be denied.

7. For the City of Florissant to have *respondeat superior* liability, there must be actionable conduct to serve as the basis for the City's liability. Where Defendants Lowery and Cordia have been dismissed from the lawsuit, there is no one upon which to base the liability claims against the City of Florissant, and Defendant City of Florissant should be dismissed.

WHEREFORE, Defendant City of Florissant prays this Court enter a judgment finding no genuine issue of material fact exists and that the City of Florissant is entitled to summary judgment as a matter of law.

EVANS & DIXON
/s/ Kurt E. Wolfgram
Henry D. Menghini #17076
Kurt E. Wolfgram #43013
Attorneys for Defendants City of Florissant, Lowery and Cordia

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 13th day of September, 1993, to: Helton Reed, Jr., Attorney for Plaintiff, and Stephen H. Gilmore, Attorney for Plaintiff . . . .

/s/ Kurt E. Wolfgram

DEFENDANT'S EXHIBIT B

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

AFFIDAVIT OF MAYOR JAMES J. EAGAN

I, James J. Eagan, having been duly sworn upon my oath state as follows:

1. I am the Mayor of the City of Florissant and was Mayor at the time of the incidents alleged in the complaint of plaintiff, William Fleming.

2. I have knowledge of the organization of the various departments of the City of Florissant.

3. The Police Department is one of the departments in the City of Florissant. Members of the Police Department do not have authority to establish the official policy of the City of Florissant with respect to the matters alleged in the petition filed by plaintiff.

4. The Mayor and Council decide any policy questions. The City has no written or unwritten policy statement, ordinance, regulator or practice authorizing or permitting the kind of activity described in the petition filed by plaintiff, William Fleming, including the alleged arrest without cause, the procuring of false testimony, or any other associated mistreatment of the plaintiff as detailed in the complaint.

5. The City does not now and has not in the past ever knowingly permitted any such acts to be performed by its Police Department.

6. The only Police Officer of the City of Florissant who worked on the Major Case Squad Investigation No. 141 was Dennis Cordia, who acted only as a Report Officer. Colonel Lowery had no involvement other than to vote with officers from other municipalities in activating the Major Case Squad.

/s/Mayor James J. Eagan

Subscribed and sworn to before me this 31st day of August, 1993.

/s/Notary Public

My commission expires: April 6, 1997.